FILED

961588 APR 7 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

KIMBERLY CLARK,
Petitioner,

v.

KATHY BURNS and THE ELECTRIC POWER BOARD OF CHATTANOOGA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner was an employee of the Electric Power Board of Chattanooga, a governmental entity who had adopted procedures requiring cause for an employee's termination. Pursuant to their procedures, Petitioner was put on suspension and then granted a pre-discharge hearing at her request.

Is this Court's ruling in Loudermill v Cleveland Board of Education, et al, 470 U.S. 532, 84 L.Ed. 2d. 494, 105 S.Ct. 1487 (1985), and the requirements of the Fourteenth Amendment to the United States Constitution satisfied by a hearing where:

1. The person holding the hearing had made his own investigation and had admittedly made up his mind to discharge Plaintiff prior to the hearing.

2. Plaintiff was not fully apprised as to what evidence was charged against her or being considered, and was, in fact, discharged over matters of which she was not notified.

3. Part of her personnel file which she was not allowed to review was considered as proof against her, but she was not shown the contents or told what proof against her to rebut or how.

PARTIES TO THE PROCEEDING

The Caption of this Petition completely and precisely reflects all parties to the proceeding. The Electric Power Board of Chattanooga is a governmental entity, and has no parent corporation or nonwholly owned subsidiaries.

TABLE OF CONTENTS

Issue Presented for Review i

Parties to Proceeding ii

Corporate Disclosure ii

Table of Contents iii

Table of Authorities iv

Citations of Opinions Below 1

Basis for Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

Argument 4

Conclusion 6

Appendix

Appendix A
Opinion of the United States Court of Appeals
for the Sixth Circuit, dated 1/9/97 . . . . . A1

Appendix B
Order and Memorandum of the United States
District Court, dated 8/24/95 . . . . . A8

TABLE OF AUTHORITIES

Cases:

Loudermill v Cleveland Board of Education, et al, 470 U.S. 532, 84 L.Ed. 2d. 494, 105 S.Ct. 1487 (1985) 4,5

Statutes:

Amendment XIV to the United States Constitution 1

CITATIONS OF OPINIONS BELOW

Neither the District Court opinion (Appendix B) nor the decision of the Sixth Circuit Court of Appeals (Appendix A), from which this Writ is Prayed, are reported. The Sixth Circuit Opinion in this case is not recommended for full text publication pursuant to the rules of that court. Both decisions are contained in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The decision of the Sixth Circuit Court of Appeals from which this review is requested was entered on January 9, 1997. No Petition for Rehearing has been requested.

This Court has Jurisdiction for this Petition under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the provisions of the Due Process Clause of the XIVth Amendment to the United States Constitution. It reads as follows:

AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner is a young white woman who was an employee of the Electric Power Board of Chattanooga as a customer service representative. Her job was to handle complaints and assist customers with any problems they might have with the utility and its services. The Electric Power Board of Chattanooga, as admitted in their answer to the lawsuit, is a governmental entity for the purposes of this case and the application of due process criteria.

Petitioner had been appointed as a representative of the other workers to act with management in discussions regarding future plans and working conditions. Some time prior to her discharge, she had a face to face discussion with Kathy Burns, her direct supervisor, at which time Burns said that the Electric Power Board may be reassigning some of its customer relations personnel to other shifts. She relayed this information to the other workers in the department, and their reactions caused serious turmoil. Burns held a meeting with the employees and told them the information was false, and then met with Petitioner to discuss the situation.

Because of her recent experience with management and Burns, Clark took a concealed tape recorder into the meeting. When asked, she admitted that she had a recorder and took it out. Burns and Ms. Glenn, her supervisor, then demanded that the recorder be turned off. Burns accused Petitioner of being a liar and of intentionally lying to the other employees to create disruption in the department. She was later to meet that with Ron Earl, the department director, who asked her if she had attempted to tape the meeting. She of course said yes. She was given a memorandum telling her of her last day of employment and of her right to a hearing. She responded by requesting her hearing (see District Court Memorandum, Appendix B, page A10).

Her hearing was conducted by Ron Earl, who had admittedly decided before the hearing that he would fire Petitioner. While she was allowed counsel, she was not allowed to see or confront either the witnesses against her, see or examine her personnel file which Earl referenced in making his decisions, question Earl about what criteria his decision was based upon or know what other conferences or "talks" Earl had done prior to the hearing, all of which he admittedly used to base his decision to fire her. Her counsel was not allowed to question or to examine the file, any other notes or records or information which Earl used to base his decision. Not being sure as to what was being considered as to her discharge and what in her record was being used, Plaintiff was left with her testimony and the entry of her positive work references and evaluations into the record. To no one's surprise, Earl upheld the discharge of Plaintiff.

Plaintiff filed suit in state Court and was removed to the Federal Court by Defendants under Federal Question jurisdiction. After the depositions of Plaintiff and of Earl were taken, Defendants filed Motions for Summary Judgment. After response was made, the District Court granted Summary Judgment as to both defendants and dismissed the case, following the logic in the memorandum issues on August 24, 1995 (See Appendix B, page A10, et seq.)

Kimberly Clark timely filed her notice of appeal of this action to the Sixth Circuit Court of Appeals, which affirmed the dismissal below by its decision of January 9, 1997 (Appendix A, pages A1-A7).

ARGUMENT

This Court had earlier begun to expand and define the range of requirements of Due Process in the employment situation where a pre-discharge hearing was provided pursuant to an employee's property right in her employment. While Tennessee is an employment at will State, as was considered heavily by the Sixth Circuit in its decision (Appendix A, Pages A1-A7), this response does not solve the problem or resolve the issue against Petitioner.

In this case, the Employer-Defendant, a governmental entity organized under Tennessee law, set out a discipline and discharge procedure which gave employees like Petitioner the right not to be discharged without cause and the right to a hearing at which she could respond to charges against her and present evidence in her defense. Since this procedure was established by the entity itself, the requirements of due process and employee protections come with the same force as those negotiated in a union contract in a right to work state. This has clearly created a protected property interest in Petitioner in her employment under the rules and regulations of the employer, separate from any state guarantees or limitations.

It is in this framework that Petitioner asks this Court to review the undisputed actions in the hearing by the designated management official against the Fourteenth Amendment Due Process requirements. This Court ruled in Loudermill, supra., that the hearing provided does not have to be a full blown adversarial hearing with all the trappings of a trial, but should provide the employee opportunity to have notice and to be heard as to the other side of the issue, to prevent against mistaken decisions.

Here, a hearing of sorts was held. The way it was held, however, did not, even under the most conservative interpretation, comply with Procedural and Substantive due

process. The District Court and the Sixth Circuit are of the opinion that what was done, complied with the required law. We do not.

Petitioner's hearing as held had the following defects:

1. The person holding the hearing had already made his own investigation and had made up his mind to discharge Plaintiff prior to the hearing.

2. Plaintiff was not fully apprised as to what evidence was charged against her or being considered, and was, in fact, discharged over matters of which she was not notified.

3. Part of her personnel file which she was not allowed to review was considered as proof against her, but she was not told what parts to rebut or how.

When this Court stressed in the Majority opinion in Loudermill, supra., that the employee must have the opportunity to be heard, that in itself would contemplate a hearing in which the someone was actually listening. Here, the hearing was held before a person who has admittedly already decided to fire her, with totally insufficient notice as to the full charges and the "evidence" against her that she was to rebut, the entire process has been downgraded to a procedural farce.

While a full blown confrontational hearing is not required in this, the actions that took place here are simply much too much less, and should not be approved.

If this is all that due process requires, then the

opportunity for a hearing is reduced to a chance for the employee to kneel on the floor, grab the legs of the hearing official and beg for her job. Petitioner does not believe that this was the type of "hearing" contemplated by this Court in their decisions in this area.

CONCLUSION

For the above reasons, Petitioner requests this Honorable Court to Accept this case for review and Issue the Writ of Certiorari that the Court of Appeals for the Sixth Circuit, granting such additional and further relief to Petitioner as this Court sees Proper.

Respectfully submitted,

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APPENDIX A

FILED
Jan 9, 1997
Leonard Green, Clerk

No. 95-6196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kimberly CLARK, Plaintiff-Appellant	)	
	)	**ON APPEAL FROM**
	)	**THE UNITED STATES**
v.	)	**DISTRICT COURT**
	)	**FOR THE EASTERN**
Kathy BURNS and the Board of Chattanooga, Tennessee,	)	**DISTRICT OF TENNESSEE**
Defendants-Appellees	)	

/

BEFORE: KRUPANSKY, BOGGS, & SILER, Circuit Judges.

PER CURIAM. Plaintiff has appealed from a district court's grant of summary judgment for defendants on her complaint, which alleged a federal civil rights violation and a state law defamation claim. Plaintiff has averred two errors: (1) the district court improperly concluded that a hearing afforded by

her former employer, Defendant Electric Power Board of Chattanooga, Tennessee ("EPB"), prior to her termination protected and preserved her right to due process guaranteed by the Constitution; and (2) the district court erroneously concluded that plaintiff presented insufficient evidence to sustain a cause of action for defamation against her former supervisor, defendant Kathy Burns ("Burns").

Since 1986, plaintiff, Kimberly Clark ("Clark"), worked for the EPB, a quasi-governmental organization, as an at-will employee in its Customer Information Center ("CIC"). The CIC staggered seven shifts of representatives to respond to customers' concerns via telephone between the hours of 7:00 AM and 8:00 PM, Monday through Friday. To the dissatisfaction of Clark, the shifts were rotated among employees on a monthly basis. Her displeasure escalated and during 1992 and 1993 Clark frequently expressed her objection to her immediate supervisor, defendant Burns. Clark repeatedly suggested that Burns assign employees to work particular shifts on a permanent basis, rather than rotate them. Although Clark's proposal was consistently rejected by Burns, her response on one particular occasion gave rise to the instant controversies.

Burns related that during a private meeting on May 6, 1993, she dismissed Clark's complaint as usual and then explained, "[W]e should all be very thankful that we do not have to work 24 hours per day, or 7 days a week, as a lot of companies require their employees to do." Clark remembered the conversation differently. She has contended that Burns said there was a "possibility" that the department would inaugurate 24 hour shifts, weekend shifts, and monitoring of all telephonic conversations. Irrespective of what Burns actually said during this discussion, on the following day two CIC employees reported to her that Clark

had cautioned them about impending changes in the working shifts. Apparently, Clark had informed some CIC employees that the EPB planned to add several additional shifts in order to cover an extensive schedule of 24 hour days, 7 days a week. (J.A. at 148.) Unhappy with this notion, some employees contemplated resignation and one promptly submitted a transfer request.

Burns attempted to quiet unrest in the department by explaining that the rumor was false. In the course of her efforts she purportedly denounced Clark as a liar, giving rise to the instant defamation charge. Burns also contacted her immediate supervisor, Alice Glenn ("Glenn"), the Superintendent of the Customer Service Department, to discuss the seminal conversation with Clark, the alleged misrepresentation by Clark of this conversation to CIC employees, and the resultant disruption caused by Clark's activities. (J.A. at 149.) Consequently, a meeting among Burns, Glenn, and Clark, to discuss Clark's alleged conduct in circulating the misinformation about the shift changes, was scheduled for May 18, 1993.

Before the meeting, Clark told some CIC employees that she secretly intended to tape record the confrontation. One of these employees informed Burns of Clark's intention. At the meeting, Burns advised Clark that she knew about the recorder, asked her to remove it, and ordered her to turn it off. The parties then discussed the events already related. Within a fortnight, Glenn's supervisor, Ronald Earl ("Earl"), also met with Clark to discuss her behavior. In both meetings, Clark denied having told the staff that the shifts would be changed and explained that she had merely indicated that shifts could be changed. Nevertheless, Clark admitted her surreptitious attempt to record the meeting with Burns and Glenn.

On May 26, 1993, Glenn prepared a memorandum advising Clark that she intended to seek her termination from the EPB on June 1, 1993 due to her misrepresentations to the CIC employees and her covert attempt to record the May 18, 1993 meeting. Both Glenn and Burns proceeded to Clark's work station, requested her to read the memorandum, gather her belongings, and leave the premises. However, Clark was permitted to remain on the payroll until the EPB afforded her an opportunity to appeal her termination at a hearing before Earl on June 1, 1993. Legal counsel represented Clark at this appellate hearing. After introductory remarks by Earl, Glenn presented her reasons for recommending Clark's termination, including the dissemination of disruptive misinformation among CIC employees and the furtive attempt to tape record a meeting with supervisors. Clark responded to the first charge by denying that she misinformed the other employees because she had purportedly only told them that shift changes were under consideration. She admitted the second charge. Clark's attorney introduced her personnel file into evidence and noted her history of generally positive evaluations and a seven percent pay increase on May 1, 1993. Clark presented no other evidence and called no witnesses. On the next day, Earl issued a letter to Clark upholding Glenn's recommendation to dismiss her. He concluded that Clark's behavior constituted insubordination and misconduct on the job.

Clark sought judicial redress in the Circuit Court of Hamilton County, Tennessee, and the case was removed to the United States District Court for the Eastern District of Tennessee. The district court confronted two legal issues. First, Clark sought to invalidate Earl's decision of termination because the EPB appellate process allegedly violated 42 U.S.C. § 1983. Second, Clark sought to recover damages

from Burns because the nature of her announcement that Clark had misstated the truth allegedly constituted defamation under Tennessee law. The district court favored both defendants on summary judgment.

This court reviews appeals from grants of summary judgment under a *de novo* standard. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). IN this context, such analysis asks the court to assess "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In its pursuit of this goal, the court must "draw all justifiable inferences in favor of the non-moving party." *Winningham v. North American Resources Corp.*, 42 F.3d 981, 984 (6th Cir. 1994). Nevertheless, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Liberty Lobby*, 477 U.S. at 252 (1986). At least one genuine issue of material fact must exist. *Middleton v. Reynolds Metals Co.*, 963 F.2d 881, 882 (6th Cir. 1992). A fact is material if it will "affect the outcome of the suit under governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Liberty Lobby*, 477 U.S. at 248.

The district court concluded that Clark was not entitled to recover under her § 1983 claim because she did not assert a constitutionally protected right to continued employment, and even assuming that she had, the EPB had given her all of the due process protection afforded by law. Because a § 1983 plaintiff must prove a constitutionally protected interest as a condition precedent to the court's cognizance of the claim, *see Ramsey v. Board of Education*,

844 F.2d 1268, 1272-73 (6th Cir. 1988), Clark's total failure to proffer any proof of a constitutionally protected property interest was fatal to her § 1983 action. By failing to present evidence on this essential element of her *prima facie* case below, Clark has waived that issue on appeal. *See Travitz v. Northeast Dept. ILGWU Health and Welfare Fund*, 13 F.3d 704, 711 (3d Cir.), *cert. denied*, 114 S.Ct. 2165 (1994); *United States v. Tracy*, 989 F.2d 1279, 1286 (1st Cir.), *cert. denied*, 508 U.S. 929 (1993); Fed.R.App.P.28(a)(3), (5), and (6); *cf. John v. Barron*, 897 F.2d 1387, 1393 (7th Cir.), *cert. denied*, 498 U.S. 821 (1990).

Regardless, because the sufficiency of a claim to a property interest in employment must be decided by reference to state law, Clark's unchallenged status as an at-will public employee in Tennessee left her no constitutionally protected property interest in continued employment. *See Gregory v. Hunt*, 24 F.3d 781, 784-85 (6th Cir. 1994). In Tennessee, an employee hired for an indefinite period is an employee-at-will, and the employment can be terminated by either party at any time with or without cause. *See Graves v. Anchor Wire Corp.*, 692 S.W.2d 420 (Tenn. Ct. App. 1985). Consequently, the district court's dismissal of Clark's § 1983 claim is AFFIRMED.

Clark's defamation claim must also fail because even if this panel were to regard the facts most favorably to her claim,[1] Tennessee law follows the general rules that "false

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[1] Clark's own conflicting renditions of the facts undermine the credibility of her accounts. In the complaint, Clark alleged that Burns reported plaintiff's "lie" about shift changes to the EPB management. (J.A. at 10 (Vol. I.) In her deposition, Clark alleged that Burns reported plaintiff's "lie" to the employees in the CIC. (J.A. at 43 (V.II).)

statements do not constitute actionable defamation merely because they are false and that the burden of proof rest[s] upon the plaintiff to demonstrate that the [statement] was, in fact, defamatory because it tended to injure plaintiff in h[er] trade, profession, or community standing, or lower h[er] in the estimation of the community or subject h[er] to scorn, ridicule, shame, contempt, or embarrassment." *Connaughton v. Harte Hanks Comm., Inc.*, 842 F.2d 825, 840 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989); *see Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820 (Tenn. 1994) ("The basis for an action for defamation, whether it be slander or libel, is that the defamation has resulted in an injury to the person's character and reputation."); *cf. Stones River Motors, Inc. v. Mid-South Pub. Co.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983) ("For a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.'") (quoting W. Prosser, *Law of Torts*, § 111 (4th Ed. 1971)). Because Clark has failed to raise a genuine issue that anyone intended to harm her maliciously or that the statements constituted a serious threat to her reputation, the district court's rejection of Clark's defamation claim is AFFIRMED.

Accordingly; the district court's judgment of August 24, 1995, is hereby AFFIRMED

APPENDIX B

FILED
Aug 24, 1995
Murry Hawkins, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

Kimberly CLARK, Plaintiff	)	
v.	)	No. 1:93-CV-356 Collier/Powers
Kathy BURNS and the Electric Power Board of Chattanooga	)	

/

ORDER

For the reasons stated above, it is **ORDERED** that the motion for summary judgment by defendants Kathy Burns and Electric Power Board of Chattanooga are **GRANTED** pursuant to Rule 56 of the Federal Rules of Civil Procedure and all claims against them are **DISMISSED with PREJUDICE.**

ENTER:

/S/_____
CURTIS L. COLLIER
United States District Judge

ENTERED AS A JUDGMENT
AUG 24, 1995
R. MURRY HAWKINS, CLERK

By /S/_____
Cyndes Holden

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

Kimberly CLARK, Plaintiff	)	
v.	)	No. 1:93-CV-356
	)	Collier/Powers
Kathy BURNS and the Electric Power Board of Chattanooga, Defendant.	)	

MEMORANDUM

Currently before the Court are the defendants' Kathy Burns and Electric Power Board of Chattanooga motions for summary judgment and the plaintiff's response thereto.[1] Both named defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as to the complaint of plaintiff Kimberly Clark for deprivation of due process rights in her dismissal from employment at the Electric Power Board. (Court File No. 1). Defendants' motions are **GRANTED** and all claims against these defendants are **DISMISSED** with **PREJUDICE** for the following reasons:

[1] Plaintiff's motion for response to be timely filed is GRANTED.

I.

BACKGROUND

The following summary of facts is compiled from the pleadings of the parties and their supporting evidence.

The plaintiff in this matter, Kimberly Clark (hereinafter Clark) was an employee for the Electric Power Board (EPB) serving as a customer adviser in the Customer Information Center (CIC). The CIC is the information center which receives phone calls from the public regarding various matters concerning the payment, maintenance and other services connected with the EPB's duties to the public. As a customer advisor Clark received approximately 100 phone calls a day from the public and could receive as many as 300 phone calls a day. (Court File No. 27, Burns Affidavit; Clark Deposition.).

Clark began working with the EPB as a temporary employee and was hired as a full time employee in December of 1986. EPB employees are not subject to any civil service or tenure system. (Court File No. 27, Earl Affidavit.). Mrs. Clark was not given a contract of employment and was hired as an "at will" employee. (Court File No. 27). Clark was later promoted to her last position of Customer Adviser. Electric Power Board Emplcyees in the CIC work seven hour shifts which are staggered throughout the week. These shifts were supervised by defendant Burns and all decisions concerning shift assignment were made by Burns.

On May 6, 1993, Clark spoke to Burns about changing the current shift assignments to permanent shifts assignments. Burns allegedly said that she would not change the shifts. After this discussion, Clark spoke about a change in the shift rotation to various employees resulting in turmoil and unrest within the department. Some employees contemplated transfers to other departments to avoid the

reported changes that were going to take place.[2] Burns learned that Clark had made these statements regarding a shift change and held a meeting with the employees of the department to inform them that the information was false. On May 18, 1993 Clark met with Burns to discuss her alleged conduct in spreading this information. Also present at this meeting was Burns' immediate supervisor, Ms. Alice Glenn.

In order to record the conversations that took place during this meeting, Clark entered Burns' office with a tape recorder hidden under her clothing. Unknown to Clark, however, another employee had informed Burns of Clark's attempt to secretly record the remarks made during the meeting. Burns requested that Clark remove the recorder and turn it off. After Clark complied with this request, the parties discussed the statements made by Clark concerning shift changes. Clark alleges that during this discussion Burns called her a liar and said that she intentionally lied to create disorder in the department. Burns denies that she called Clark a liar. Mr. Ronald D. Earl, the manager of the division which includes the CIC and Ms. Glenn's immediate supervisor, was informed of Clark's conduct and met with Clark on May 26, 1993. (Court File No. 27, Earl Affidavit.). At this conference Clark admitted to secretly attempting to tape record the Burns meeting. After the meeting, Earl told Clark to return to her workstation. Later that day, Clark was given a memorandum informing her that her employment with EPB was to end June 1, 1993 due to misrepresentations and attempting to record the meeting with Burns. (Court File Numbers 27, 29, and 1). Clark was then given an opportunity to appeal her termination at a June 1

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[2] The motions made by the defendants state that several employees were concerned about being assigned late shift hours permanently due to their lack of seniority.

hearing. Clark attended the meeting with her attorney and continued to receive her regular pay until the date of the hearing. (Court File Numbers 27, 29, and 1). At the hearing Clark presented positive evaluations from her personnel file and presented no other evidence. However, the plaintiff argues that she was denied opportunity to be heard. (Court File No. 1). On June 2, 1993 Clark was fired by Earl who stated that enough evidence was presented at the hearing to warrant her dismissal.

Clark sued in the Circuit Court of Hamilton County, Tennessee and this suit was removed to the United States District Court on August 26, 1993. The plaintiff claims that her substantive and procedural due process rights were violated by EPB when they dismissed her, depriving her of her property right in her employment. Plaintiff Clark further alleges that Kathy Burns' statement about her lying were improper and constitute defamation under Tennessee law. (Court File No. 1).

II.

DISCUSSION

A. Summary Judgment Standard:

Fed. R. Civ. P. 56(c) provides that summary judgment will be rendered if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show conclusively that no genuine issue of material fact exists, and the Court must view and all inferences in the light most favorable to the nonmoving party. *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406 (6th Cir. 1994); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street*

Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial solely based on allegations. The nonmoving party must come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Kentucky Horsemen's Ass'n*, 20 F.2d at 1411; *White*, 909 F.2d at 943-44; *Ivy Street*, 822 F.2d at 1435. The moving party is entitled to summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411.

The trial court's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper jury question, and not to weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street*, 822 F.2d at 1435-36. The standard for summary judgment mirrors the standard for directed verdict. The court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based upon the evidence presented, it may enter summary judgment. *Id.*

B. Fifth and Fourteenth Amendment Allegations:

The plaintiff in her complaint alleges that EPB violated her procedural and substantive due process rights

when they dismissed her from her position thereby depriving her of property and violating the Fifth and Fourteenth Amendments of The United States Constitution and 42 U.S.C. § 1983. EPB in its motion for summary judgment argues that it took all of the necessary steps to ensure that Clark's due process rights were maintained and that her dismissal was justified.

The plaintiffs must establish in its Section 1983 claim the existence of a constitutionally protected property interest. *Ramsey v. Board of Education*, 844 F.2d 1268 (6th Cir. 1988); *Leis v. Flynt*, 439 U.S. 438 (1979) (a plaintiff must have enforceable claim to assert a Section 1983 claim); *Riverview Investment Inc., v. Ottawa Community Improvement Corp.*, 769 F.2d 324, 327 (6th Cir. 1985); *Gregory v. Hunt*, 24 F.3d 781, 785 (6th Cir. 1994); *Bennet v. Steiner-Liff Iron and Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992). Here the plaintiff asserts a property interest claim resulting from her employment. The sufficiency of the claim to property interest in employment must be decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341 (1976); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Woosley v. Hunt*, 932 F.2d 555 (6th Cir. 1991). In *Duncan v. Onida* this Court held that "the State of Tennessee does not grant by statute, or otherwise, a right to continued public employment." *Duncan v. Onida*, 564 F.Supp. 425, 426 (E.D. Tenn. 1983) aff'd, 735 F.2d 998 (7th Cir. 1984). The Tennessee Supreme Court has held:

> "A public employee is not deemed to have a contract of employment within the meaning of the 'impairment of contract' provisions of the state and federal constitutions unless the employee is affected by a tenure or civil service system."

Blackwell v. Quarterly County Court, 622 S.W.2d 535, 539 (Tenn. 1981). *See also Garvie v. Jackson*, 845 F.2d 647 (6th Cir. 1988); *Bush v. Johnson*, 602 F.Supp. 96 (E.D. Tenn. 1985).

Applying the above law to the facts, the Court finds that the plaintiff has not asserted a constitutionally protected right to continued employment. The affidavits submitted by the defendants, and uncontested by the plaintiffs, showed that Clark was not under any form of durational employment contract while she was employed with EPB. (Court File No. 27, Earl Affidavit; Clark Deposition, page 33, lines 14-24). All of the evidence presented shows that Clark was an employee at will and that she understood this. The standard for summary judgment is to view the evidence in the light most favorable to the nonmoving party. *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc.*, 20 F.3d 1411 (6th Cir. 1944); *White*, 909 F.2d at 943 (6th Cir. 1990); *60 Ivy Street Corp.*, 822 F.2d at 1435 (6th Cir. 1987). The nonmoving party must come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. V. Catrett*, 477 U.S. 317 (1986); *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411; *White*, 909 F.2d at 943-44; *Ivy Street*, 822 F.2d at 1435. The plaintiffs have brought forward no evidence to contest the affidavits of Earl or Burns. (Court File No. 35, Plaintiffs Response to Summary Judgment). Further the plaintiff has only supported the statements of the defense by submitting the entire uncontested deposition of Mr. Earl which clearly says that the plaintiff is employed at will. The plaintiff has failed to come forward with significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Kentucky Horsemen's Ass'n*, 20 F.3d at 1411; *White*, 909 F.2d at 943-44; *Ivy Street*, 822 F.2d at 1435.

The plaintiff also asserts that her procedural due

process rights were violated by the manner in which the dismissal took place. The Supreme Court along with the Sixth Circuit held that the due process clause requires specific measures in the dismissal of a government employee. A public employee with a property interest in her employment must be given oral or written notice of dismissal, an explanation of the employer's reasons for the dismissal, and an opportunity to be heard. *Loudermill v. Cleveland Board of Elections*, 844 F.2d 304, 310 (6th Cir. 1988) on remand from *Loudermill*, 470 U.S. 532. Justice White, writing for the majority in *Loudermill* held that an employee is only entitled to these actions because the purpose of the process is to ensure that the discharge is not a mistake. *Loudermill*, 470 U.S. at 546. Due process demands a pretermination hearing be held to determine if the termination is being done on reasonable grounds. *Id.* This hearing does not have to be elaborate, it need only provide an opportunity to be heard. *Id.* To require more would unnecessarily burden the government when terminating unsatisfactory employees. *Id.*

Clark argues that she was denied due process protection; however, her pleadings state the opposite. According to the complaint, Clark was informed of her habits, given a letter of discharge and a hearing to appeal her discharge. (Court File No.1). Under the ruling of the Supreme Court and the Sixth Circuit she was given due process protection. Affidavits and depositions presented by both sides acknowledge that Clark had an opportunity to be heard, and this opportunity is all that the law requires. (Court File No. 27, Earl Affidavit, Burns Affidavit, and Memorandum of Recommendation for Termination). Evidence proffered by the defense shows that Clark was aware that the appeal was her opportunity to be heard on the

issue of dismissal.[3] (Court File No. 27). This, Clark was given all of the due process protection afforded by the law; she was given notice (a memorandum) and an opportunity to be heard.

It is for the reasons stated above that the Section 1983 claims alleging a violation of due process must be dismissed with prejudice against the named defendants in this case.

C. Defamation Allegations:

The complaint of Clark alleged that defendant Burns defamed her character by calling her a liar. To sustain a defamation suit a plaintiff must show more than mere statements of a defamatory nature. *Dunneburke v. Williams*, 381 S.W.2d 909 (1964). To prevail in a defamation suit the plaintiff must show communications that are a serious threat to her reputation. *Stones River Motors, Inc. v. Mid-South Publishing Co.*, 651 S.W.2d 713, 719 (Tenn. App. 1983). To assert defamation the plaintiff must also show publication of the statements. *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190 (Tenn. 1973). Clark alleges that Burns published these statements when Burns stated "she lied" when asked directly by an employee the validity of Clark's statements regarding the shift changes. However, the defendants have persuasively argued that the alleged statements do not constitute defamation because they were based upon disclosed facts. In support of this contention the defendants cite *Stones River Motors and Windsor v. Tennessean*, 665 S.W.2d 680 (1983). Both authorities explain the law in Tennessee regarding the publication of disclosed facts. No matter how

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[3] According to the evidence proffered by the defense, uncontested by the plaintiff, Clark brought her attorney with her to the appeal hearing.

derogatory the statements are, the statements are only an expression of opinion based upon those facts. *Windsor*, 654 S.W.2d at 686. See also Connaughton v. Hearte Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1987) (generally the rule is that false statements do not form actionable defamation due to the plaintiff's burden to show that the statement was made to injure the plaintiff in his trade, profession or community subjecting her to shame, ridicule or contempt).

The defendants argue that Burn's statements were based upon information she had received from the facts. Whether she had actually received these facts is a question for a jury; however, due to the weight of authority asserting that only those statements which are a **serious** (emphasis added) threat to an individual's reputation may be considered defamation, we find that Burns' motion for summary judgment should be granted.

Further, the plaintiff must show that the statements made by Burns were done to defame her reputation. Viewing the evidence in the light most favorable to Clark, it appears that the statements, even if true, were said to explain the statements of Clark. The Court must look at the statements in the context of the situation and surroundings of the event. *Connaughton*, 842 F.2d at 840. Burns has presented affidavits and depositions showing an environment of disorder regarding the shift changes. (Court File Numbers 25 and 27, Clark Deposition, pages 51-58). These depositions include statements by the plaintiff.[4] The plaintiff has not brought forth any evidence to refute the evidence offered by the defense and thus has failed to raise an issue of fact which

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[4] The Clark deposition, on page 57, has the plaintiff stating that there was a "big blowup" about various employees "getting bent out of shape" reagarding a proposed shift change.

must be brought before a jury. For the above reasons the motion for summary judgment regarding the allegations of defamation is granted.

III.

CONCLUSION

The motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure from defendants Burns and Electric Power Board are **GRANTED** and all claims against these defendants are dismissed with prejudice.

/S/_____
CURTIS L. COLLIER
United States District Judge